



McGuinness, S. (2016). Legal Commentary: St George's Healthcare NHS Trust v S; R v Collins and others, ex parte S [1998] 3 All ER 673. In S. Smith, J. Coggon, C. Hobson, R. Huxtable, S. McGuinness, J. Miola, & M. Neal (Eds.), *Ethical Judgments: Re-Writing Medical Law* Hart Publishing.

Peer reviewed version

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PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Hart Publishing at <http://www.hartpub.co.uk/books/details.asp?isbn=9781849465793>.

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Legal Commentary: *St George's Healthcare NHS Trust v S; R v Collins and others, ex parte S* [1998] 3 All ER 673

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1. Introduction

This commentary reflects on the actual judgement and the ethical judgments in the case of *St George's Health NHS Trust v S*. My argument provides a feminist legal critique and through a wider socio-legal contextualisation, invites an understanding of the systemic harms to women and their reproductive freedom that may be achieved through the law, given not just the *outcome* of S's case, but also the reasoning within and around it.

My analysis is framed by the concept of 'gendered harms' in reproduction and pregnancy. I take this framing from Robin West, who suggests that legal systems can compound and legitimate harms that are experienced disproportionately or solely by women.¹ Joanne Conaghan summarises the concept as follows:

[T]he notion of 'gendered harm' is but one way of recognizing that injury has a social as well as an individual dimension: people suffer harm not just because they are individuals but also because they are part of a particular class, group, race or gender. Moreover, their membership of that particular class, group, race or gender can significantly shape the nature and degree of the harm they sustain. The problem with law then is its failure to recognize

¹ Robin West *Caring for Justice* (New York University Press, 1997)

that social dimension.²

It is my argument that we must recognise how law's manipulation of women and their (potential) reproductive choices shapes social norms and expectations.³

To fully understand how women are subjugated and oppressed in the sphere of reproduction, it is crucial to recognise the stark contrast between the respect afforded to non-pregnant persons' medical decision-making and that of pregnant persons. Furthermore, it is not just pregnant women who are oppressed, but all women with the capacity to become pregnant. In regard to the latter, their agency is contingent on a hypothetical state that they may never enter. As Drucilla Cornell tells us:

The very constitution of selfhood cannot be separated from the protection of the future projections of the woman's self as a whole body. The threat takes effect before any woman actually has to face an unwanted pregnancy. Here we have an important example of how the symbolization of a woman's "sex" has a constitutive effect on what we have come to think of as selfhood. Not only is a woman's individuality not just given, it is limited in its very definition by certain symbolizations of her "sex" in the law.⁴

Women with the capacity to become pregnant live in the shadow of this latent state of affairs. And, as evidenced by the circumstances of S's case and the rhetoric in parts of the judgments, such women's agency (legal, moral, and social) is contingent on pregnancy not arising. Given this, it is not just unwanted pregnancy that gives rise to contingent subjectivity, but all instances of pregnancy within legal cultures that allow

² Joanne Conaghan 'Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment' (1996) 16 *Oxford Journal of Legal Studies* 408

³ See for example Rebeka Kukla, *Mass Hysteria: Medicine, Culture, and Mothers' Bodies* (Rowman & Littlefield, 2005)

⁴ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harrassment* (Routledge 1995) 52

pregnant women's decision-making capacity to be treated with suspicion: or as stated by Fovargue LJ "place[s] pregnant women in a different position to others with capacity".⁵ Decisions such as Neal LJ's are therefore best understood, I will argue, as examples of how law legitimates and compounds a particular form of gendered harm.⁶ And it is not just the sanction of forcible treatment but the broader legal culture which makes forcible treatment possible.

I will conclude that law is consistently disappointing in the sphere of reproductive "control". Siorcha Uí Chionnachtaigh, in her ethical commentary, details the negative reproductive experiences that women continue to have, notwithstanding grand statements from the Courts and legislators.⁷ As Carol Smart warns us:

Just as medicine is seen as curative rather than *iatrogenic*, so law is seen as extending rights rather than creating wrongs. It is perhaps useful to coin the term *juridogenic* to apply to law as a way of conceptualizing the harm that law may generate as a consequence of its operations.⁸

It is my contention that a legal culture which attributes subjectivity to the foetus prioritises foetal interests through enforcing treatment on pregnant women and causes a specific form of gendered harm on women like *S* even where it appears to vindicate their rights.

2. The Importance of Autonomy in Medical Law

⁵ Fovargue, LJ, this volume, s.17

⁶ Neal, LJ, this volume

⁷ Siorcha Uí Chionnachtaigh, this volume drawing from Birthrights, *Dignity in Childbirth: The dignity survey 2013: Women's and midwives' experiences of dignity in UK maternity care* (Birthrights, 2013)

⁸ Carol Smart *Feminism and the Power of Law* (Routledge, 1989) 12

Respect for patient autonomy is a foundational principle in English medical law.⁹ However, early judicial defences of the primacy of respect for patient autonomy provide a potential exception if the interests of a foetus were at stake. Consider Lord Donaldson MR's famous *dicta* in *Re T*:

An adult patient who ... suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment... The only possible qualification is a case in which the choice may lead to the death of a viable foetus... This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.¹⁰

This reasoning provides a key legal cornerstone for Neal LJ's decision and reflects a legal culture that is prepared to attribute subjectivity to the foetus.¹¹ West highlights the importance of examining legal culture when considering the impact of gendered harms. She argues that to focus exclusively on "positivistic or instrumentalist" forms of sanction misses how law influences how we behave and how we perceive ourselves and as such shapes our behaviour.¹² Within the sphere of reproductive control, I would suggest, judicial expressions of expectations of pregnant women lead to the reinforcement of some of the most archetypal examples of patriarchal oppression; legal judgments themselves reinforce societal expectations of limits that should be placed on (potentially) pregnant women, as a category that can and should be contrasted with other patients.¹³

⁹ John Coggon 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15 *Health Care Analysis* 235-255

¹⁰ *Re T (Adult: Refusal of Medical Treatment)* [1992] WLR 786

¹¹ Neal (n6) s.5

¹² West (n1) 151

¹³ See Sara Fovargue & Jose Miola 'Policing pregnancy: implications of the attorney-general's reference (no. 3 of 1994)' (1998) 6 *Medical Law Review* 265-296.

This distinctive treatment is marked, and cannot be overstated. Forcible treatment of pregnant women constitutes a sharp departure from the principle of respect for autonomy; a principle whose importance extends generally in medical law not just to contemporaneous decision-making, but also to considering the previous wishes, feelings, and values patients who come to lose capacity.¹⁴ Against this general absolutist respect for patient autonomy in medical law, and the high reverence given to individuals' previously expressed values and wishes once they lose capacity, or even after they die, the preparedness even to consider forcing treatment on pregnant women presents a deviance that demands scrutiny.

We come to this position as a consequence of attributing of subjectivity to the foetus. This process of attribution robs the pregnant woman of her own subjectivity and reduces her to the physicality of her role as foetal incubator. Susun Bordo frames it thus:

The essence of the pregnant woman... is her biological, purely mechanical role in preserving the life of another. In her case, *this* is the given value, against which her claims to subjectivity must be rigorously evaluated, and they will usually be found wanting insofar as they conflict with her life-support function. In the face of such conflict, her valuations, choices, consciousness are expendable.¹⁵

Thus law and medicine often collude in the sphere of reproductive decision-making to legitimate a specific form of gendered harm to pregnant women.

3. Gendered Harms

¹⁴ Mental Capacity Act 2005, section 4(6).

¹⁵ Susan Bordo *Unbearable Weight Feminism: Feminism, Western Culture, and the Body* (University of California Press, 1993) 79

So what is the gendered harm that women face here? S was articulate and informed about her healthcare rights to the extent that she could challenge and assert how she would like to be treated. Yet in Judge LJ's original decision he expresses sympathy for the professionals who have to deal with a woman who is failing to live up to societal expectations regarding appropriate maternal behaviour:

Faced with the serious consequent risk to the health of their babies very many mothers would be prepared to compromise their beliefs.¹⁶

S is found to be “intransigent” and the Court expresses admiration for the social worker who had S sectioned, noting her “courage in reaching any decision at all in such difficult circumstances when faced with a life and death situation and *an unusual, unreasonable mother to be*”.¹⁷

S is unusual; she is articulate and vocal and refuses to capitulate in the face of professional opposition. Yet the characterisation of her situation emphasises the pervasive and systemic way that her voice—like that of other women—is silenced and their subjectivity subsumed by concern for foetal interests. In deciding to act in a way that contradicts societal constructions and expectations, S is presented as somehow deviant and her sense of self not to be trusted.

West's analysis, which provides the gendered harm framing that I am employing here, focuses on instances of sexual violence and the experience of unwanted pregnancy.¹⁸ She argues that these are “defining harmful experiences for women”—and not just the experience of them, but the capacity of potentially experiencing them. I would extend her analysis and suggest that pregnancy can, regardless of whether it is

¹⁶ *St George's Healthcare NHS Trust v S; R v Collins and others, ex parte S* [1998] 3 All ER 673, per Lord Judge 694

¹⁷ *Ibid* 694 [emphasis added]

¹⁸ West (n1) Chapter 4

wanted or not, constitute a harm to women. As much was appreciated by Hale LJ in *Parkinson*:

Not surprisingly, their Lordships did not go into detail about what is entailed in the invasion of bodily integrity caused by conception, pregnancy and child birth. But it is worthwhile spelling out the more obvious features... From the moment a woman conceives, profound physical changes take place in her body and continue to take place not only for the duration of the pregnancy but for some time thereafter. Those physical changes bring with them a risk to life and health greater than in her non-pregnant state. ... Along with these ... goes a severe curtailment of personal autonomy. Literally, one's life is no longer just one's own but also some-one else's. ... Continuing the pregnancy brings a host of lesser infringements of autonomy related to the physical changes in the body or responsibility towards the growing child.¹⁹

This is the situation for *all* pregnant women and it is their preparedness to undertake this role that leads to what Bordo describes as the “biting injustice” of cultural suspicion of pregnant women; pregnant women are according to Bordo “probably the ‘Best Samaritans’ of our culture”.²⁰ The harm done to women such as S through the threat, and perceived social acceptability, of enforced treatment is taken further by understanding the experience of pregnancy as a form of intimacy. Magaret Olivia Little argues:

To be pregnant is to be inhabited. It is to be occupied. It is to be in a state of physical intimacy of a particularly thorough-going nature. The fetus intrudes on the body massively; whatever medical risks one faces or avoids, the brute

¹⁹ *Parkinson v St James & Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, per Lady Justice Hale at 56

²⁰ Bordo (n16) 83

fact remains that the fetus shifts and alters the very physical boundaries of the woman's self.²¹

S, in defining the boundaries of the reproductive experience she wanted, was setting intimate boundaries. The hallmarks of our social constructions of positive pregnancy are altruistic heroism in which the pregnant woman gives herself over to the interests of the foetus in the way Hale LJ describes above. The violence of forced caesarean sections constitutes an invasion of bodily integrity and intimacy that shares features of the gendered harms of both sexual violence and unwanted pregnancy. The process of labour and childbirth are physically and emotionally painful; the pain of the physical process but also the altering of the maternal bond between the pregnant woman and the foetus she has carried within her.²² When this happens in the context of coercion it transforms the birthing process into a traumatic and injurious experience; it becomes a form of “invasive terror” which denigrates the woman’s selfhood objectifying her as a foetal incubator.²³

In S’s case, she maintains her refusal to consent but does not physically resist:

In fact she had decided that to struggle physically and be overcome would be undignified. She therefore lay still offering no resistance when ... she was sedated. ... Under the pressures of an exhausting and emotionally charged situation, and faced with the court order, S ceased to offer any resistance. This was not consent but submission.²⁴

The outcome for S is a situation where a heightened concern for the foetus leads to the wiping out of her agency. S is robbed of her subjectivity and her ability to enter into an intimate relationship with her now born child is marred by a violent and

²¹ Margaret Olivia Little ‘Abortion, Intimacy, and the Duty to Gestate’ (1999) 2 *Ethical Theory and Moral Practice* 301

²² West (n1) 127

²³ Here I am drawing on both West (n1) and Bordo (n16)

²⁴ *St George's Healthcare NHS Trust v S* (n17) 684

traumatic invasion of her body. The forcible treatment constitutes an archetypal moment of controlling women to fulfil their mechanistic reproductive function.

4. Conclusion

S's case was part of a series of decisions in English medical law that assessed whether women were to be assumed incompetent by virtue of their being in labour or indeed simply pregnant. Such cases are interesting in their presentation of foetal subjectivity. Imposition of treatment on the pregnant woman against her will is justified by reference to the interests of a not yet existing being. And this brings us to the crux of the matter. Existing legal frameworks are as likely to harm women like *S* as they are to help her, regardless of the actual legal outcome.

This is underscored by language such as that used by Neal and Judge LJ. In considering their decisions, we find an acceptance of the legal validity of framing a maternal/foetal conflict²⁵ In accepting this framing, we do two things. First, we accept the existence of the foetus as an independent entity; and second we accept that the pregnant woman constitutes a threat to this entity. In the original decision Judge, LJ spends approximately six pages considering 'the status of the foetus' but only a single page considering the importance of autonomy. Furthermore, he emphasises that most would have sympathy with the desire to forcibly treat *S*, notwithstanding that it was unlawful; judicially acknowledging such sympathies serves to legitimise what has been done to *S*.

Foetal-centric thinking also permeates Neal LJ's judgment. Her judgement radically reinterprets the 'ethic of care' to justify the abandonment of the pregnant

²⁵ Bordo (n16) 94

woman's autonomy to protect the life of the foetus. Her approach uses legal reasoning to mask how the pregnant woman's sense of self cannot be disentangled from her decision to navigate the boundaries of the intimate relationship that she has with the foetus. Neal LJ uses the rhetoric of the "nearly-born" to advocate for the primacy of the "foetus whose gestational parent is determined to destroy it".²⁶ Her judgment elevates the foetus' status to "the life of another" that S should not be allowed, by refusal of consent (to a breach of *her* bodily integrity) to refuse "non-futile treatment".²⁷ Neal LJ is right to hold, at the time of S, that "our legal culture and its ethical underpinnings [were] capable of supporting the *qualification* of the right to refuse treatment contemplated by Lord Donaldson in In re T". However, this is not something to be celebrated.

Therefore, I welcome Fovargue LJ's approach, which departs from foetal-centric thinking acknowledging that:

It is clear that a theme within the decision making processes of the professionals was concern for the health of the foetus. This (unspoken) agenda permeates the evidence from the professionals...²⁸

Fovargue LJ displays sympathy with this approach, but cautions against it, reminding us that treatment must be in S's best interests.²⁹ We should be concerned with S's needs.³⁰ We should try and put ourselves in S's position. Such an approach resists a pervasive attitude within forcible treatment cases where increased empathy with the foetus is taken to mean that women's agency can be reduced.³¹

²⁶ Neal (n6) s.3

²⁷ Neal (n6) s.7

²⁸ Fovargue (n5) 15a

²⁹ Fovargue (n5) 15b

³⁰ Fovargue (n5) 14

³¹ Fovargue (n5) 17

Overall, though, we cannot confine a legal critique of *S* to the facts or legal reasoning in that case alone; law more widely and insidiously causes systemic harm to pregnant women. My intention here is not to ignore the value or dignity of foetal life but rather to recalibrate an approach to these cases that imagines “that the ‘life’ of the fetus is inseparable from the physical and mental well-being of the women of whose body *it is part*.”³² Whilst judicial reasoning could have led to an outcome against or in *S*’s favour, a truly ethical judgment would not perpetuate law’s reproduction of gendered harms, and would instead place the woman and respect for her decision-making at its heart.

³² Cornell (n4) 32